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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 701

LA SALLE STEEL COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

Comes now La Salle Steel Company, a corporation, to petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in the cause therein entitled *National Labor Relations Board* v. *La Salle Steel Company*, No. 9863, and in support of said petition respectfully shows as follows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner, La Salle Steel Company, hereinafter called the Company, is a Delaware corporation engaged in the manufacture, sale and distribution of cold drawn steel and shafting. The cause herein arose from a complaint filed on March 25, 1946, by the National Labor Relations Board charging that the Company had engaged in and was engaging in interference, restraint and coercion of its employees at its Hammond, Indiana, plant in the exercise of rights protected by the National Labor Relations Act[1] in violation of Section 8(1) of said Act. The complaint further charged that the Company had and was dominating and interfering with La Salle Steel Employees' Association, Inc., hereinafter called the Association, a labor organization admitting to membership employees at said Hammond plant in violation of Section 8(2) of the Act.

After proceedings pursuant to the Act, the Board, on February 6, 1947, issued its order dismissing the complaint insofar as it alleged violations of Section 8(2) of the Act. The Board, however, found that the Company had violated Section 8(1) of the Act, and ordered the Company to cease and desist from:

(1) Encouraging activity on behalf of the Association and against the United Steelworkers of America, C.I.O. (hereinafter called the C.I.O.).

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1. The National Labor Relations Act (49 Stat. 449, 29 U. S. C. section 151 *et seq.*), herein called the Act, was amended by Section 101 of the Labor Management Relations Act, 1947, effective August 22, 1947 (61 Stat. 136, 29 U. S. C. Supp. I (1948) Section 141 *et seq.*). Enforcement of the order was sought under the provisions of the amended Act.

(2) Prohibiting union activity on Company property during non-working time.

(3) Otherwise interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act.

The Board further ordered the Company to take the following affirmative action:

(1) To rescind its no-solicitation rule for employees insofar as such rule prohibited union activity on Company property during non-working time.

(2) Refrain from bargaining with the Association as the representative of any of its employees unless and until the Association was certified by the Board.

(3) To post customary notices of compliance with the Board's order at its plant.

The National Labor Relations Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of its order, and on December 9, 1949, the Court of Appeals entered its decision that the Board's order should be enforced in its entirety. A decree was entered by the Court of Appeals pursuant to its decision on January 3, 1950.

It is the Company's position that the findings of the Board do not support its conclusion that the Company violated Section 8(1) of the Act or its order based on its said conclusion. The Company's further position is that the Board's said conclusion and order are barred by the free speech provision of the First Amendment to the Constitution of the United States and Section 8(c) of the National Labor Relations Act. The decision of the Court of Appeals that the order of the Board should be enforced is therefore erroneous.

B. OPINIONS BELOW.

The decision of the Court of Appeals is reported in 178 F. 2d 829. The decision and order of the National Labor Relations Board is reported in 72 N. L. R. B. 411. The Board's decision and order which resulted in an election among employees of the Company on April 20, 1945, is reported in 61 N. L. R. B. 151.

C. BASIS OF JURISDICTION.

Section 10(e) of the National Relations Act (29 U. S. C. Section 160) provides, in part, that the judgment and decree of the court of appeals on petition for enforcement of an order of the National Labor Relations Board shall be final except that the same shall be subject to review by this Court upon writ of certiorari or certification, as provided in Section 346 and 347 of the Judicial Code (28 U. S. C. Sec. 1254). Jurisdiction of this Court is based accordingly on Section 10(e) of the National Labor Relations Act and Sections 346 and 347 of the Judicial Code, as revised.

D. STATEMENT OF THE CASE.

The Company owns and operates its plant at Hammond, Indiana, at which approximately 300 employes were employed at the time of the events relevant to the cause herein (B. A.[2] 22, 97, 103).

The Association is an Indiana not-for-profit corporation formed in August, 1937, as a labor organization admitting to membership employees of the petitioner's Hammond, Indiana, plant (C. A. 48-49). Upon verifying its claim that it represented a majority of employees, the Company recognized the Association as exclusive bargaining representative of its employees for the purposes of the Act on August 25, 1937 (C. A. 50). During the seven years subsequent to 1937, the Company and the Association met frequently for the purpose of collective bargaining and discussion of grievances. Matters taken up in the meetings included wage increases, distribution of hours, vacations, general plant health conditions, piece-work rate and bonus systems and shift differentials (C. A. 10-11, 17, 30-32; B. A. 75, 76). The Company and the Association, however, refrained from entering into a contract or bargaining agreement during the pendency of the 1945 election (B. A. 75, 76).

The Company became aware of an organization drive among its employees by the C.I.O. in November 1944, when the Company was advised that unfair labor practice charges had been filed by the C.I.O. with the Board (B. A. 73-74).

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2. References to the portions of the transcript of proceedings printed in the Appendix to the brief of the National Labor Relations Board to the Court of Appeals are made as follows: (B. A. ....). References to the portions of said transcript printed in the Appendix to the Company's brief to the Court of Appeals are made as follows: (C. A. ....).

A petition for an election was filed by the C.I.O. with the Board on February 1, 1945 (C. A. 39). After a hearing the Board ordered an election, which was conducted by the Board on April 20, 1945. 106 votes were cast for the Association; 93 votes for the C.I.O.; 4 votes against the participating unions and 3 votes were challenged (C. A. 39). The Board withheld certification of the Association as victor in the election because of objections to the conduct of the election which were filed by the C.I.O. on April 24, 1945 (C. A. 37-38). The Regional Director for the Board on May 26, 1945, issued a report on the objections to the election finding that substantial and material issues with respect to the conduct of the election had been raised and recommending that the election be vacated and the results thereof declared void (C. A. 41-43).

On March 22, 1946 the C.I.O. filed with the Board a document entitled "Fourth Amended Charge", alleging that the Company had engaged in and was engaging in unfair labor practices within the meaning of Section 8(1) and (2) of the Act (C. A. 92, 100). On March 25, 1946, the Board's Regional Director issued a complaint based upon such charge alleging that the Company had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1) and (2) and Section 2(6) and (7) of the Act. The significant portions of the complaint are as follows (B. A. 97):

> "3. Respondent did on or about April, 1937, initiate, form, sponsor and promote the Independent, and from and after April 1937 to date Respondent has assisted, dominated and contributed to the support of and interfered with the administration of said Independent.
>
> "4. The Respondent by its officers, agents, and supervisory employees, while engaged in the operation of its plant described above, from about April, 1937 and at various times thereafter down to the date of

this Complaint, did urge, warn, and threaten employees against joining or assisting the Union, its predecessors, and bona fide labor organizations generally, did interrogate its employees about their union membership and union activities, warned employees against talking about labor organizations on company property, disparaged the Union and other labor organizations, warned the wife of an employee against her husband's participating in the Union, and requested and instructed supervisors to discourage membership and activity in the Union."

On March 22, 1946, the Board ordered a consolidated hearing on the complaint and the report of objections to the election (B. A. 94-95). The hearing before the trial examiner commenced on April 8, 1946 at Hammond, Indiana (B. A. 94).

At the close of the Board's case, the Company filed a motion to dismiss each paragraph of the complaint (C. A. 18). The trial examiner granted the motion to dismiss the allegations of the complaint that the Company had warned the wife of an employee against her husband's participation in the C.I.O. and that the Company has requested and instructed its supervisors to discourage membership and activity in the C.I.O. (C. A. 18-25; B. A. 21-22).

On May 8, 1946 the trial examiner issued an intermediate report finding that the Board had introduced no evidence to show that the Company had initiated, formed, sponsored or promoted the Association at its formation, nor any substantial evidence to show that afterwards, the Company had dominated or interfered with the administration of the Association or contributed to its support. The trial examiner accordingly concluded the Company had not violated Section 8(2) of the Act and recommended dismissal of the complaint to that extent (B. A. 32). The trial examiner concluded, however, that the respondent had violated Section 8(1) of the Act (B. A. 32).

The Board adopted the conclusion of the examiner with respect to section 8(2) of the Act, and accordingly dismissed the complaint in so far as the alleged violations of Section 8(2) (B. A. 13). The Board concurred in the findings and conclusion of the trial examiner that the Company had violated Section 8(1) of the Act.

1. Evidence of Alleged Unfair Labor Practices.

The Board's conclusion that the Company had violated Section 8(1) of the Act was purportedly supported by the following testimony and other evidence:

(a) Evidence Regarding Statements of See, Evens and Sylwestrowicz.

Joe Anderson, a Board witness, was one of the employee bargaining representatives of the Association (B. A. 54, 55). He testified that the following transpired at one of the regular collective bargaining meetings between respondent and the Association, which occurred in September, 1944 (B. A. 55):

> "Well, Mr. See [Vice President of the Company] opened the meeting and said that he wanted the Association kept running. He said he didn't want it to die out and he said he should not be saying this. He is sticking his neck out too far. By that I don't know what he meant, but he wanted to see the Association kept going."

At that time See was not aware that the C.I.O. was engaged in organizing activities at the plant (C. A. 73-74). Anderson joined the C.I.O. after the bargaining meeting and voted in the election of April 20, 1945 (C. A. 9).

Francis Sutkowski, a machine operator, testified that Superintendent Evens called him in to his office several times late in October, 1944, to discuss his work. In the

course of one of the discussions Sutkowski testified the following transpired (B. A. 46, 47):

> "• • • He [Evens] told me, 'Well,' he says, 'Frank, I don't see what the C.I.O. will do you old men in here, and another thing,' he says, 'I don't see how we could apply the seniority in here with the men I have the way the C.I.O. runs their seniority.'
>
> "I said, 'Well, I don't know much about the C.I.O., and I never belonged to it and I don't know what kind of setup they have in there,' and then I remember he said, 'I know that you are not much in favor of it.' And he also told me that—he says, 'Well,' he says, 'as far as the C.I.O. is concerned, well,' he says, 'It is up to you old men. If you want it in, well, there is nothing that I can do about it.' I remember he told me that. 'However,' he says, 'if you old men don't want it in here,' he says, 'there is a lot you can do.' He says, 'There is Herman Uhter,' he says, 'there is Story, Fred Lack,' he says, 'they are trying hard to stop it.' "

Sutkowski testified that he had answered Cyrus W. Walker, an agent of the Board, as follows, when the latter was investigating charges against respondent early in November, 1944, when Walker asked him whether he would testify as to his conversations with Evens (C. A. 4):

> "I said 'I don't know. He [Evens] didn't say anything out of the way. He didn't knock the Union, he just talked to me.' "

Emil Balash, an employee, testified that he had the following conversation in September, 1944, with Andrew Sylwestrowicz, whom he described as "more or less what you would call a pusher, just a foreman" (B. A. 57, 58, 59):

> "A. He told me, he says there is going to be some men out at the gate passing out C.I.O. hand bills and that I shouldn't pay any attention to them, that he thought LaSalle Steel was very equal with their men and that they didn't need any union and he said

he never thought that the C.I.O. would get into LaSalle Steel.

* * * * *

"A. The next day, the following day, he asked me if I went to the [C.I.O.] meeting, and I asked him why, and he just says well they heard they had a handful of men there.

* * * * *

"A. Andy told me that the Association was getting active and looking for new members and asked me to join it. That is all."

None of the employee witnesses called by the Board testified that at any time they were under any compulsion or coercion by the Company, either with respect to the activities in behalf of the Association or the C.I.O. Sutkowski in his testimony above stated that Evens told him the matter of union activities was "up to him" (B. A. 46). Pete Wolik testified that Evens shortly before the election stated to him "I don't want you to vote this way or that way, but it is up to you to make up your mind" (C. A. 16). George Nack testified to the same effect and testified that See and Evens had not treated him unfairly (C. A. 10). Anderson and Sutkowski joined the C.I.O. after the alleged conversations with See and Evens, and there is no evidence that either of them had any misgivings or any cause for misgivings with respect to their jobs with the company (C. A. 6, 7, 9).

(b) Announcement of the War Labor Board Approval.

On November 25, 1944, the National War Labor Board approved vacation increases and a second shift premium of four cents per hour and a third shift premium of six cents per hour for the basic steel industry whose employees were represented by United Steelworkers of America—C.I.O., in Case No. 111-6230-D, entitled *Matter of Carnegie-*

Illinois Steel Corporation, et al. (B. A. 110). Thereafter the War Labor Board extended the same increased vacations and shift differentials to companies in the steel industry not involved in the Basic Steel case upon individual application of the company and the bargaining representative of their employees, if any (B. A. 110). In January, 1945, the Company and the Association jointly filed a Form 10 application with the War Labor Board for authority to grant vacation increases and shift premiums in line with the *Basic Steel* case (B. A. 69).

In the course of its campaign before the April 20, 1945, election, the C.I.O. distributed fliers to employees which read, in part, as follows (C. A. 42, 47):

> "The Company has asked the Board to approve a night shift bonus for you equal in amount, but not in application, to that ordered in Steel. Since the C.I.O. has representatives on the War Labor Board and they will have to pass upon this issue, the C.I.O. has asked the Board to approve the Form 10 for your night shift bonus regardless of who wins the election. Since the C.I.O. is sure of winning, we shall ask the Board for immediate approval of the Form 10 now before the Board * * *. We shall ask the War Labor Board immediately for one week vacation for all with one year's service and two weeks' vacation for all employees with five years' service. Since this is what the Company asked for to keep C.I.O. out, we shall have the Board approve their request and then C.I.O. will negotiate with the Company for the rest of the provisions of application of vacations."

The War Labor Board approved the joint application of the Company and the Association on April 12, 1945 (B. A. 39, 71, 110). On April 18, 1945, the formal authorization papers were mistakenly sent by the War Labor Board to another company (B. A. 71). On the morning of April 20, 1945, the date of the election, the other company notified the Company herein of the receipt of the letters from the

War Labor Board and of their contents (B. A. 71). During the noon hour Vice President See dictated a notice which was posted on the plant bulletin boards (B. A. 27, 72). The notice stated (B. A. 27, 108):

> "We are pleased to announce that the National War Labor Board has approved the application of the La Salle Steel Company and La Salle Employees Association's application requesting a second shift premium of four cents per hour and a third shift premium of six cents per hour retroactive to January 1, 1944, together with increased vacations retroactive to 1944 vacation season. Such premiums will be placed in effect at the earliest possible moment. Retroactive payments will be made as quickly as the work of figuring can be done."

(c) The Company's Restriction of Solicitation of Union Membership.

At the time when organizational activities of the rival unions became intense, the Company posted a notice stating that employees were not permitted to engage in any union activities on company time. It was pointed out that union activities included passing out union buttons, cards or literature or soliciting employees to join a union (C. A. 50). The rule was enforced only with respect to such activities on company time and was never applied to such activities on plant property outside of the working hours (C. A. 2, 7, 34). The Board found the no-solicitation rule was applied without discrimination between the Association and the C.I.O. (B. A. 8).

On April 19, 1945, the day preceding the election, the Company distributed to its employees a letter which stated, among other things (B. A. 106):

> "Solicitation of memberships of any kind on company time or property has been and will continue to be prohibited."

Insofar as the April 19 statement indicated prohibition of solicitation on Company property outside of working hours, it represented a departure from the Company's existing rule and was never enforced (C. A. 34, 2, 7).

2. The Board's Findings and Conclusions.

The Board's findings and conclusions with respect to the statements of See, Evens and Sylwestrowicz were as follows (B. A. 7-8):

> "1. The Trial Examiner found that the respondent, by the conduct of Vice-President See, Superintendent Evens, and Foremen Sylwestrowicz and Walker, violated Section 8(1) of the Act. We agree with the Trial Examiner, except insofar as he relies upon Foreman Walker's remark to employee Skaggs. It is clear from the record that Walker was merely recounting his own previous experience with unions and had reference to the 'A.F.L.' and not to the union here involved. As to the other conduct embraced in the Trial Examiner's finding, we find no merit in the respondent's contention that it was protected under the constitutional guaranty of free speech. Certainly, the interrogation of employee Balash by Foreman Sylwestrowicz as to whether Balash had attended a meeting of the Union, and Sylwestrowicz's later solicitation of Balash to join the Association, constituted acts of unlawful interference and intimidation *per se*. Likewise, Vice-President See's statement to representatives of the Association 'that he wanted the Association kept running' and the pressure exerted upon employee Sutkowski by Superintendent Evens to enlist his aid in supporting the Association and defeating the Union, were not mere expressions of opinion, but constituted conduct designed to throw the full weight of management's prestige and economic power behind the Association."

The Board further found that the announcement of the War Labor Board approval was motivated by a desire to

influence the results of the election against the C.I.O., and concluded therefore that it was violative of Section 8(1) of the Act (B. A. 10).

The Board's findings and conclusions with respect to the no solicitation rule were as follows (B. A. 8):

> "With respect to the respondent's no-solicitation policy, we agree with the Trial Examiner insofar as he found that the no-solicitation rule promulgated by the respondent in its letter of April 19, 1945, which prohibited union solicitation on company property outside of working time, constituted an unreasonable impediment to self-organization and was therefore violative of the Act. However, we are not convinced by the record, and we do not find, that the respondent otherwise applied its no-solicitation rule in a discriminatory manner."

The Board further found that the Company's letter to employees of April 19, 1945 constituted an unfair labor practice for the sole reason that it "contained the first verbal promulgation of an unlawful no-solicitation rule, which forbade union activity outside of working hours" (B. A. 9). The Board stated in this respect (B. A. 9):

> "Unlike the Trial Examiner and Mr. Houston, we do not believe that the letter can reasonably be regarded as an inseparable and integral part of the respondent's antecedent unfair labor practices which were coercive in nature, for these all occurred in 1944, *approximately 6 months earlier.*" (Original emphasis.)

3. The Decision of the Court of Appeals.

The Court of Appeals found that the statements of See and Evens were interrogations as well as the statement of Sylwestrowicz, contrary to the Board's findings and the testimony in the record. The evidence does not contain a single question relating to Union activities addressed by

either See or Evens to any employee. The Court also found that the statements made in 1944 should be taken in connection with the War Labor Board announcement in April 1945 and that taken together they constituted unlawful interference. This finding was also in conflict with the finding of the Board that the 1944 statements were not connected with the circulation of letter to employees which occurred at the time of the election in 1945. There is no basis for a supposition that the 1944 statements had any more connection with the announcement than the circulation of the letter which occurred at the same time.

The Court further found that the "interrogation" did not stand "naked and alone," despite the finding of the Board that Sylwestrowicz' question to Balash should be taken by itself and *per se,* constituted an unfair labor practice (B. A. 8). The Court held that the alleged statements of Sylwestrowicz were not isolated because of the statements of See and Evens, and therefore Sylwestrowicz' statements were attributable to the Company. The Court's holding was in the face of the fact that the portion of the complaint which alleged that the Company requested and instructed supervisors to discourage membership and activity in the union was stricken by the trial examiner on the motion of the Company on the grounds that there was no evidence to support the same (C. A. 24; B. A. 21-22). Furthermore it is apparent from an examination of the Board's decision that the Board considered the statements and the announcement as distinct and separate matters. There is no finding by the Board to the effect that the statements or announcement were related or that the Company had engaged in any course of conduct.

The holding of the Court of Appeals on the application of the First Amendment to the statements of See, Evens and Sylwestrowicz and the announcement of the War Labor Board was as follows:

> "* * * it seems clear that the first Amendment's free speech guaranty cannot be used as a shield for an employer to 'interfere with, restrain or coerce employees in the exercise of the rights guaranteed. * * *' them by the Act. And it is also clear that the statements in question, in connection with the announcement made by the respondent on the day of the election, constitute substantial evidence of interference, by respondent, with its employees' freedom of choice in the election, * * *."

Section 8 (c) of the Act, enacted subsequent to the Board's decision in this case, provides that the expressing of any views, argument, or opinion or the dissemination thereof, shall not constitute or be evidence of an unfair labor practice under any provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit. The Court held that Section 8 (c) did not apply on the following basis:

> "And both the announcement by respondent of the War Labor Board's approval of a raise negotiated between it and the Association, made on the day of the election and even before respondent had received official notice thereof, and the interrogation of its employees (which does not stand 'naked and alone' as did that in the *Sax* case, *Sax* v. *N. L. R. B.*, 171 F. 2d 769 (C. A. 7)), accompanied by none too subtle intimations of its preference for the Association over the C.I.O., seem to us to go beyond the expression of 'views, argument or opinion' contemplated by Section 8 (c) and constitute acts of interference with its employees' right to elect their own bargaining representative, and to require this court to sustain the Board's finding that respondent violated Section (1) of the Act."

It is undisputed in the record that the Company refrained from entering into a contract or bargaining with the Association during the pendency of the Board's election among employees (B. A. 75-76). The Board's order,

nonetheless, provides that the Company refrain from entering into any collective bargaining contract with the Association or otherwise dealing with it as bargaining representative unless and until said Association shall have been certified as such representative by the Board (B. A. 2-3). The Court nonetheless held that it was proper for the Board to order the Company to refrain from committing the unfair labor practice of bargaining during the election, which the Company had not committed.

The portions of the Board's order relating to the no-solicitation rule are entirely separate and distinct from the other portions of the case. There was no evidence of any application of the no-solicitation rule, and the Board found there was no discrimination between the Association and the C.I.O. in the matter of the rule.

The Company conceded that Sections 1 (b) and 2 (a) of the Board's order relating to the no-solicitation rule were proper on the basis of mere promulgation of the rule under decisions of this Court in *Republic Aviation Corp.* v. *N. L. R. B.* and *N. L. R. B.* v. *LeTourneau Co.*, 324 U. S. 793. The Company contended, however, that the rule of evidence in the *Republic Aviation* and *LeTourneau* cases had been made inapplicable by the amendment to Section 10 (e) of the Act enacted in 1947. The Court of Appeals held that, regardless of the intent of Congress in the matter and the language of the amendment, the rule of the cases had not been changed by amendments to Section 10 (e).

The Court of Appeals accordingly entered judgment enforcing the order of the Board in its entirety.

E. QUESTIONS PRESENTED.

The questions presented fall into three categories: questions under the First Amendment to the Constitution of the United States, questions under Section 8 (c) of the Act, and questions under Section 10 (e) of the Act. The questions involve two separate and unrelated matters: first, the portions of the Board's order based on statements of supervisory employees of the Company and announcement of the War Labor Board approval, and second, the portion of the Board's order based on the Company's no-solicitation rule. The various questions applicable to each portion of the Board's order are closely interrelated.

1. Questions Presented Under the First Amendment to the Constitution of the United States.

The following questions are presented under the First Amendment:

(1) Do the statements of See, Evens and Sylwestrowicz and the announcement of the War Labor Board approval constitute speech within the protection of the First Amendment?

(2) Does the First Amendment apply to the use of employers' speeches to its employees as evidence of unfair labor practices under the Act and to orders of the Board, based on evidence of such speeches?

(3) Does the clear and present danger test first enunciated by this Court in *Schenck* v. *U. S.*, 249 U. S. 47, apply to speech of an employer to its employees as evidence of unfair labor practices under the Act?

(4) In view of the First Amendment, may the words "interference, restraint or coercion" in Section 8(a)(1)

of the Act be interpreted to apply to speeches by an employer where the employer did not use its economic power to override the will of employees either in connection with the speeches or in any other connection?

2. Questions Presented Under Section 8 (c) of the National Labor Relations Act.

The following questions are presented under Section 8 (c) of the Act:

(1) Do the statements of See, Evens and Sylwestrowicz and the announcement of the War Labor Board approval constitute "the expressing of views, argument or opinion" within the meaning of Section 8 (c)?

(2) May such statements and the announcement constitute or be evidence of unfair labor practices in view of Section 8 (c)?

(3) In its application to this case, is the free speech protection provided in Section 8 (c) broader than the guaranty of the First Amendment?

3. Questions Presented Under Section 10 (e) of the National Labor Relations Act.

The following questions are presented under Section 10 (e) of the Act:

(1) May the Court of Appeals substitute its own inconsistent findings of fact for those of the Board?

(2) Inasmuch as the Board reached its decision on the basis that the statements of See, Evens and Sylwestrowicz and the announcement of the War Labor Board approval were isolated and separate unfair labor practices, could the Court of Appeals properly consider the statements and announcement together on the theory that they together

constituted a pattern or a course of conduct by the Company?

(3) May statements of personal opinion by minor supervisory employees contrary to the Company's policy, be properly attributed to the Company?

(4) Is there substantial evidence on the record as a whole to support the Board's order, or any part thereof?

(5) Is Section 2 (b) of the Board's order, requiring the Company to refrain from entering into any collective bargaining contract with the Association or otherwise dealing with it as bargaining representative until certification by the Board, improper and punitive in view of the undisputed evidence that the Company has refrained from entering into a contract or bargaining with the Association during the pendency of the election?

(6) Is the decision of this Court in *Republic Aviation Corp.* v. *N. L. R. B.* and *N. L. R. B.* v. *LeTourneau Co.*, 324 U. S. 793, to the effect that a rebuttable presumption of an unfair labor practice is created by the existence of a company rule prohibiting union activities on company property outside of working hours, still applicable in view of the 1947 amendments to Section 10 (c) of the Act?

F. REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court of Appeals That the First Amendment Does Not Apply to Section 8(1) of the Act Is Untenable and Contrary to the Unanimous View of This and All Other Courts. Such Unwarranted Deprivation of the Right of Free Speech Is a Matter of Grave Public Importance Which Should Be Reviewed by This Court.

The First Amendment is clear and unequivocal. "Congress shall make no law * * * abridging the freedom of speech, or of the press." The Court of Appeals nonetheless held "it seems clear that the First Amendment's free speech guaranty cannot be used as a shield for an employer to 'interfere with, restrain or coerce employees in the exercise of the rights guaranteed * * *' by the Act."

The Court of Appeals' decision is the only decision we know of that the First Amendment does not apply to any act of Congress. The decision is untenable in face of the clear and unequivocal language of the First Amendment. Decisions of this and other courts to the contrary are too numerous to list. It should be sufficient to refer the Court to its decision in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, which held the First Amendment applicable to the very provisions of the Act involved here. In *Thomas* v. *Collins*, 323 U. S. 516, this Court emphasized the paramount importance of the free speech guaranty in the area of labor relations, including speech by employer representatives to employees.

The decision of the Court of Appeals is so manifestly erroneous and so contrary to all authority that it is necessary to demonstrate that the decision of the Court is

actually what it appears to be. The only respect in which speech by supervisors to employees stands on a different footing than speech by one citizen to another lies in the management authority of the supervisor over the employee. Unless the supervisor uses the economic power of his managerial authority to override the employee's will, either directly or by implication, speeches by supervisors to employees are on exactly the same footing as the speech of one citizen to another. There is not a shred of evidence in this record that management's economic power was directed against employees in connection with statements of supervisory employees, the announcement of the War Labor Board approval, or in any other connection. The findings and conclusions of the Board were made on the basis that there was no direct use of economic power, but that *any* statement to an employee by *any* top representative of a management was *necessarily* "coercive." The Court of Appeals abandoned even this unrealistic argument and indicated that it recognized that the statements and announcement contained no threat of reprisal or force or promise of benefit within the meaning of Section 8 (c) of the Act. The Court decided the case on the basis that there was no use of economic threats against employees either directly or by implication. The element of compulsion or overriding the will of employees therefore was not and could not have been the basis of the Court of Appeals decision.

The Court of Appeals did not consider the statements of supervisors or the announcement of the War Labor Board approval to be "views, argument or opinion" within the meaning of Section 8(c) of the Act. It apparently, however, considered them to be covered by the broader term "speech" under the First Amendment. In any event, the broad term "speech" obviously covers the conversations between individuals and the written announcement in-

volved herein. This Court held in *Thomas* v. *Collins,* 323 U. S. 516, that the term speech in the first amendment must be given broad application to all forms and subjects of communication.

It is to be emphasized that there was no evidence other than the statements of three supervisors to employees and the announcement of the War Labor Board approval on which the Board found the Company assisted the Association and interfered with the C. I. O. in violation of the Act. The Court of Appeals, as well as the Board, relied on the statements and the announcement alone. The holding of the Court of Appeals that the First Amendment does not apply to Section 8(1) of the Act, therefore, is based entirely on speech by supervisors to employees, in the absence of any direct or implied use of economic power by the Company against employees. The holding of the Court of Appeals that the First Amendment does not apply to employer speech is, therefore, unmistakable and categorical.

As this Court pointed out in connection with orders of the Board and judicial decrees based thereon, in *N. L. R. B.* v. *Stowe Spinning Co.,* 336 U. S. 226, 233, orders and decrees are to be read in the background of the evidence adduced to support them. Applying this principle to the case at hand the Company is forbidden by the order and decree not only from expressing any view, argument or opinion favorable to the Association or unfavorable to the C. I. O. either through top supervision or through day to day conversation of minor supervisors with employees, but, on the basis of finding as to the War Labor Board approval, the Company is forbidden to state any fact to employees which might have a favorable implication to the Association or unfavorable one to the C. I. O. The Court of Appeals clearly indicates that it considered the effect of

the order was to limit speech by the Company to its employees. We believe that this is the most sweeping and drastic assault upon employers' right to free speech in the history of the National Labor Relations Act.

The vital importance of the free speech guaranty to the maintenance of a democratic system of government has been frequently noted by this Court. The Court stated in *Palko* v. *Connecticut*, 302 U. S. 319, 327:

> "Of that freedom one may say that it is the matrix, the indispensable condition of every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal." (Cardozo, J.)

Mr. Justice Brandeis, concurring in *Whitney* v. *California*, 274 U. S. 357, 375-357, stated:

> "Those who won our independence * * * knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form * * * Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

Mr. Justice Roberts speaking for the Court in *Schneider* v. *New Jersey*, 308 U. S. 147, 161, stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights

and liberties. This phrase is not an empty one and not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

See also the citation of the *Schneider* case in *Marsh* v. *Alabama,* 326 U. S. 501, 509.

The Court has specifically dealt with the importance of the free speech guaranty in the field of labor relations. In *Thornhill* v. *Alabama,* 310 U. S. 88, 102-103, the Court stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution * * *. The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us to be indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." (Murphy, J.)

See also the citation of the *Thornhill* case by the Court in *Thomas* v. *Collins,* 323 U. S. 516, 532-3. Mr. Justice Jackson, concurring in the *Thomas* case, stated (323 U. S. 547):

> "Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wage, employer unfairness, or objectionable working condition. The employer, too, should be free to answer, and to turn publicity on the records of the leaders of union which seeks the confidence of his men."

Throughout the proceedings before the Board and the Court of Appeals in this case we have had to rub our eyes to believe that this was happening in the United States. The proceedings progressed throughout on the basis that not only is it unlawful for an employer to openly express the view that another labor organization is preferable to the C. I. O., but commonplace conversations between supervisors and employees and the announcement of the official order of a government agency were scrutinized microscopically to see if some suggestion or implication of a view unfavorable to the C. I. O. or favorable to the Association could be found. The Board has embarked on an effort to regulate the Company which approaches the control of its thought as well as its speech to employees, and the Court of Appeals has given the Board its complete approval in this assault upon a basic heritage and vital principles of our government. Surely this Court will not countenance this drastic and wholly unwarranted deprivation of the right of free speech.

2. The Court of Appeals Misinterpreted, Misapplied and Ignored Numerous Decisions of This Court.

The Court of Appeals regarded the decisions of this Court in *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, and *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, as decisive of the free speech issue in this case despite the fact that there was no free speech question involved in either the *Machinists* or the *Link-Belt* case. The portion of the *Machinists* decision, quoted with approval in *Link-Belt* and relied on by the Court of Appeals herein, is as follows (311 U. S. 78):

> "Known hostility to one union *and clear discrimination* against it may indeed make seemingly trivial intimations of preference for another union powerful

assistance for it. Slight suggestions as to the employer's choice between unions may have telling effect among men *who know the consequences of incurring that employer's strong displeasure.*" (Emphasis supplied.)

The evidence in the *Machinists* case was held to support the Board's findings that five C.I.O. officials had been discharged because of their union activities, that supervisory employees sponsored and solicited membership for the A. F. of L. and threatened employees with loss of employment if they did not sign up with the A. F. of L., and that unions discriminatory practices had been employed in favor of the A. F. of L. and against the C.I.O. The decision of the Court related to use of economic power by the Company to assist one of the rival unions, and no question of the effect of speech by the employer was raised. In this case the Court of Appeals itself found there was no use of economic power either directly or by implication, and the order of the Board prohibiting assistance is based wholly on speech. It is unfathomable how the Court of Appeals found the *Machinists* even applicable to the free speech issue, much less controlling it.

In the *Link-Belt* case the evidence was found to support the Board's conclusion that the Company had dominated one of the rival unions in violation of Section 8(2) of the Act. None of the evidence relied on consisted of speech, and the free speech issue was not even raised. The Section 8(2) aspect of the *Link-Belt* case was similar to the portions of the complaint in this case which the Board dismissed as not supported by the evidence. There was, furthermore, evidence of discrimination against employees in *Link-Belt.* It may be that when discrimination has been practiced, a subsequent statement of preference may carry an implied threat of discrimination. It seems elementary, however, that in the absence of discrimination, as in this case, this principle has no application.

The Court of Appeals also quotes from the decision of *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, to the effect that conduct though evidenced in part by speech may in connection with other circumstances amount to unlawful coercion in the apparent belief that it is applicable to this case. The Court of Appeals overlooked the fact that the purported evidence of coercion relied on by the Board in this case consists entirely of speech. It is submitted that the portion of *Virginia Electric & Power* relied on by the Court is wholly inapplicable, and the Court is in error.

The clear and present danger test for prohibition of speech was first enunciated by the Court through Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47. The principle is that speech may be suppressed only when

> "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

The Court recognized in *Thomas* v. *Collins*, 323 U. S. 516, that the above test applies to suppression and regulation of employer free speech equally to speech by labor representatives. We believe that a careful reading of *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, indicates that the Court was applying the clear and present danger test therein. Although Section 8(1) of the Act prohibits "interference, restraint and coercion," the Court carefully specified that employer's speech could only be found evidence of an unfair labor practice if it amounted to "coercion". In other words, only if it contained an element of economic force which overrode the will of employees could it be so used. It may be said then that only when it is used in connection with economic force can employer speech be considered an unfair labor prac-

tice and evidence thereof without violating the First Amendment. This view of the *Virginia Electric & Power* case was adopted in *N. L. R. B.* v. *Brown-Brockmeyer Co.* (C. A. 6) 143 F. 2d 537, 542-3; *Edward G. Budd Mfg. Co.* v. *N. L. R. B.* (C. A. 3) 142 F. 2d 922, 927; *N. L. R. B.* v. *Montgomery Ward & Company* (C. A. 8) 157 F. 2d 486; *N. L. R. B.* v. *Caroline Mills, Inc.* (C. A. 8) 158 F. 2d 793, 794; *N. L. R. B.* v. *Continental Oil Co.* (C. A. 10) 159 F. 2d 326, 330; and *N. L. R. B.* v. *J. L. Brandeis & Sons* (C. A. 2) 145 F. 2d 556, 564.

Be that as it may, the *Virginia Electric & Power* case has been subject to much controversy and difference of opinion. Compare for example the decision of the Court of Appeals for the Second Circuit in *N. L. R. B.* v. *American Tube Bending Co.*, 134 F. 2d 993, cert. den. 320 U. S. 768, with that of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *M. E. Blatt Co.*, 143 F. 2d 268. Members of this Court itself in separate opinions in *Thomas* v. *Collins*, 323 U. S. 516, 543-548, indicated difference of opinion as to the proper interpretation of the decision. This confusion clearly calls for the farther consideration of the Court through the grant of certiorari herein. Mr. Justice Jackson indicated that it is his view that reconsideration of the *Virginia Electric & Power* decision is desirable in his separate opinion in the *Thomas* case, 323 U. S. 516, 548.

Inasmuch as the Court of Appeals held herein that the First Amendment did not apply at all to employer speech, it had no occasion to consider the application of the clear and present danger test. In its interpretation of the words "interference, restraint and coercion" in Section 8(c), moreover, the Court fell into a related error.

In *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 568, the Court stated with reference to interpretation of Section 2 of the Railway Labor Act

of 1926, upon which Section 8(1) of the National Labor Relations Act was based in considerable measure:

> "The meaning of the word 'influence' in this clause may be gathered from the context * * * the use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by other in derogation of what the statute calls 'self organization.' The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, * * *."

Nevertheless, in enacting the National Labor Relations Act, Congress deliberately substituted the word "restrain" for the word "influence," realizing that such substitution would limit the scope of the Act.[3] Under the decision in the *Brotherhood of Railway Clerks* case, it is therefore clear that the Court of Appeals herein was in error when it held that the statements of supervisors herein and the announcement of the War Labor Board approval constituted "interference, restraint and coercion" within the meaning of Section 8(1) of the Act. Compare in this regard the contrary decision of Court of Appeals for the Second Circuit regarding similar statements of supervisors in *N. L. R. B.* v. *J. L. Brandeis & Sons,* 145 F. 2d 556, 564.

The Court of Appeals, as we pointed out on page 15 above, in several matters substituted its own inconsistent finding of fact for those of the Board. In doing so it erroneously assumed a power which this Court repeatedly has held to be granted exclusively to the Board by Section 10(e) of the Act. *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S.

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3. Senate Committee on Education and Labor Rep. No. 1184, 73d Cong. 2nd Sess.; Senator Walsh in hearing before said Committee on S. 1958, p. 305; Senator Walsh, 79 Cong. Record 7960.

584; *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72; *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206.

The Court also considered the evidence of the 1944 statements of the supervisors in connection with the announcement of the election in 1945 on the theory that it constituted a single course or pattern of conduct. The majority of the Board specifically rejected the view the 1944 statements were related to events at the time of the election, which had been adopted by the trial examiner and Mr. Houston, the dissenting member of the Board. The Court's action in considering the evidence as a "course of conduct" in the face of the Board's consideration of the case on the basis that the speeches and announcement constitute four separate and distinct unfair labor practices is clearly erroneous under the Court's decision in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469.

The Court of Appeals action in supporting the portion of the Board's order requiring the Company to refrain from entering into a contract or bargaining with the Association during the pendency of a new election is in the face of undisputed evidence that the Company refrained from entering into a contract or bargaining with the Association while the election of April 20, 1945 was pending. The Court of Appeals decision in this regard is directly contrary to decisions of this Court that it is beyond the power of the Board to order an employer to refrain from committing unfair labor practices which there is no evidence he has committed or is likely to commit. *N. L. R. B.* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217; *N. L. R. B.* v. *Stowe Spinning Co.*, 336 U. S. 226; *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426.

The numerous instances where the Court of Appeals has misinterpreted, misapplied and ignored decisions of this

Court demand that the petition herein be granted by this Court so that the decision of the Court of Appeals may be reviewed.

3. The Decision of the Court of Appeals With Respect to Questions Presented Herein Is in Conflict With Decisions of Other Courts of Appeals.

We have indicated above numerous decisions of other courts of appeals which are in conflict with the decision herein on the question of the application of the First Amendment. In this subsection we confine our attention to conflicts on the other questions presented.

The Court of Appeals held that the announcement of the War Labor Board approval and the statements of supervisors constituted acts of interference with its employees' right to elect their own bargaining representative, and therefore "seem to us as to go beyond the expression of 'views, argument or opinion' contemplated by Section 8(c)." The holding is in effect that if the expression of views, argument or opinion constitute interference, they are not barred as evidence of unfair labor practices by 8(c). The Court apparently considers Section 8(c) as applicable only to expressions which would not in any event be unfair labor practices under the Act. Under this view Section 8(c) has no significance whatsoever. The decision of the Court is in conflict with those of every other court of appeals which has had occasion to interpret Section 8(c). The decisions of the other courts uniformly interpret the phrase "views, argument or opinion" to apply to expressions of the type found herein, and the courts hold that the issue presented by Section 8(c) is whether there were threats of reprisal or force or promise of benefit contained in the expressions. *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.* (C. A. 9), 178 F. 2d 445;

N. L. R. B. v. *Electric City Dyeing Co.* (C. A. 8), 179 F. 2d 323; *N. L. R. B.* v. *Minnesota Mining & Mfg. Co.* (C. A. 8), 179 F. 2d 323; *Pittsburgh S. S. Co.* v. *N. L. R. B.* (C. A. 6), decided February 17, 1950, 25 L. R. R. M. 2428. The Court in the *Pittsburgh S. S. Co.* case stated:

> "With reference to the right of free speech the legislative history shows that the amendment embodied in § 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

Moreover, less than two weeks after its decision in this case the Court of Appeals abandoned its untenably restrictive interpretation of "views, argument or opinion" in Section 8(c) and held that the phrase applied to similar expressions to the ones in this case in *N. L. R. B.* v. *Kropp Forge Co.*, 178 F. 2d 822.

The legislative history of the 1947 amendment to Section 10(e) of the Act indicates that Congress was unwilling to continue to allow Board findings to be supported by special presumptions based on alleged expertness of the Board in matters covered by the Act.[4] The Board's expertness was regarded as unreliable, and an improper substitute for evidence in the record. In order to accomplish this result the words substantial evidence "on the record considered as a whole" were added to Section 10(e).

One of the results specifically intended by the 10(e) amendment was to preclude further applicability of the decision of this Court in *Republic Aviation Corp.* v. *N. L. R. B.* and *N. L. R. B.* v. *LeTourneau Co.*, 324 U. S. 793, that the mere existence of a company rule against union activity on company property outside of working hours justifies a presumption that the rule is not necessary to

4. House Report No. 245, 80th Cong. 1st Sess., p. 41; House Conference Report No. 510, 80th Congr. 1st Sess., p. 56.

efficient production, because of the Board's assumed expertness in the matter. We do not know how the amendment could have more aptly provided that findings of the Board must thereafter rest on "evidence in the record" and not on a presumption that a no-solicitation rule was not necesary to efficient production in the absence of any evidence in the record on the matter. The Court of Appeals nonetheless held that regardless of the language of the 10(e) amendment and the intent of Congress, the *Republic Aviation* and *LeTourneau* cases were still applicable under the amended Act. The Court's decision in this respect is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *N. L. R. B.* v. *Enid Co-Op. Creamery Assn.*, 169 F. 2d 986, to the extent that it was there held that the question of the relation of the no-solicitation rule to efficient production should be remanded to the Board for further evidence in absence of evidence in the record.

4. Since the Board's Theory of the Free Speech Issue in Part Conflicts With the Decision of the Court of Appeals and in Part Is Inconsistent With Its Own Current Decisions, the Free Speech Issue Is of Major Importance to the Administration of the Act.

The Board found that the question addressed to Employee Balash by Sylwestrowicz and Sylwestrowicz's later solicitation of Balash to join the Association constituted unlawful interference and intimidation *per se*. This finding is to be contrasted with the holding of the Court that the interrogation constituted unlawful interference only when taken in connection with the statements of See and Evens and the announcement of the War Labor Board approval on the apparent theory that together they constituted an unlawful course or pattern of conduct. The Court made no reference to the evidence of solicitation.

The apparent reason for the Court's treatment of the interrogation evidence was the decision of the Court in *N. L. R. B.* v. *Sax,* 171 F. 2d 769, specifically rejecting the Board's theory that an isolated question to an employee regarding union activity, in the absence of discrimination or threats thereof, constitutes a violation of the Act. The Court there stated (171 F. 2d 773):

> "No case has been cited and we know of none holding the view asserted by the Board here."

The identical argument of the Board was rejected by the Court of Appeals for the Fourth Circuit in *N. L. R. B.* v. *Hinde & Dauch Paper Co.,* 171 F. 2d 240.

Nonetheless, the Board persists in its view that questions concerning union activity or membership by management representatives to employees always constitutes a violation of the Act regardless of the circumstances.[5]

The Board did not press its finding that the alleged solicitation of Balash did not constitute protected free speech and was *per se* unlawful interference, and this finding was not considered by the Court. Doubtless, the Board realizes that its finding in this regard is untenable in view of *Thomas* v. *Collins,* 323 U. S. 516, which holds that solicitation for union membership is speech protected by the First Amendment.

The finding of the Board that the conversational statements of See and Evens to employees which allegedly contained statements of preference for the Association and hostility to the C.I.O. constituted unlawful interference, in the absence of any act of discrimination or threat thereof, illustrates a curious inconsistency in Board decisions be-

5. *Ames Spot Welder Co., Inc.,* 75 N. L. R. B. 352; *Sohio Pipe Line Co.,* 75 N. L. R. B. 858; *Wayneline, Inc.,* 81 N. L. R. B. 511; *Interchemical Corp.,* 83 N. L. R. B. No. 95; *Standard-Coosa-Thatcher Co.,* 85 N. L. R. B. No. 224; *Empire Pencil Co.,* 86 N. L. R. B. No. 118; *Kallaher and Mee, Inc.,* 87 N. L. R. B. No. 61; *Jacksonville Motors, Inc.,* 88 N. L. R. B. 48.

fore the Taft-Hartley Act. The Board held that similar statements, when contained in letters to employees or speeches to large groups of employees were protected by the First Amendment.[6] The Board attempted to establish a different rule for conversational statements to individual employees or small groups of employees in an apparent attempt to limit the application of the decision in this Court in *N. L. R. B.* v. *Virginia Electric & Power Company*, 314 U. S. 469. It is significant that since the enactment of Section 8(c) of the Act, the Board has abandoned its theory of distinction between conversational statements and public announcements to employees.[7] It is therefore apparent that the Board's conclusion that the statements of See and Evens were unlawful interference, is inconsistent with its own current decisions.

There is much confusion on the free speech questions raised by this case between the theories of the Board and the Court of Appeals, and even among the Board's own decisions. We should think that the Board itself would welcome this opportunity to clarify questions which have caused so much conflict. It is hard to believe that the Board can feel sanguine about the view repeatedly expressed in the Eightieth Congress and by numerous litigants before the Board that its policy of repressing employer speech under the Act has been an unwarranted assault upon American traditions of free speech.

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6. *Fisher Governor Co.*, 71 N. L. R. B. 1291; *United Welding Co.*, 72 N. L. R. B. 954; *Electric Steel Foundry*, 74 N. L. R. B. 129; *Tomlinson of High Point, N. C.*, 74 N. L. R. B. 681.

7. *Fulton Bag and Cotton Mills*, 75 N. L. R. B. 883; *General Shoe Corp.*, 77 N. L. R. B. 124; *Burns Brick Co.*, 80 N. L. R. B. 89; *Tennessee Valley Broadcasting Co.*, 83 N. L. R. B. No. 134; *Joy Togs, Inc.*, 83 N. L. R. B. No. 148; *Tennesse Coach Co.*, 84 N. L. R. B. No. 85.

5. This Case Presents Important Questions of Interpretation of Section 8(c) and the 10(e) Amendment Which Have Not Been Previously Presented to and Should Be Decided by This Court.

Section 8(c) has not yet been presented to this Court for interpretation. The amendment to Section 10(e), insofar as it applies to a no-solicitation rule, likewise has not been presented. In view of the conflicts in decisions of the Court of Appeals on the questions presented under these provisions of the Act herein, it is highly appropriate for this Court to review the questions at this time.

The importance of the questions presented is demonstrated by the attention that was given to the problems by the Eighticth Congress during committee hearings and debates on the Taft-Hartley Act. The fact that amendatory legislation was enacted applicable to questions here presented is proof of their public importance.

WHEREFORE, your petitioner prays that a writ of certiorari be granted to the United States Court of Appeals for the Seventh Circuit to the end that the cause herein may be reviewed and decided by this Court.

Respectfully submitted,

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March, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 701

LA SALLE STEEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (C. A. 52-61),[1] is reported at 178 F. 2d 829. The findings of fact,

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[1] References to portions of the record printed by the Board and the Company are designated "(B.A.)" and "(C.A.)" respectively. References to the typewritten transcript of testimony, certified by the Board to the court below, and lodged by the Clerk of the Court of Appeals with this Court, are designated "(Tr.)".

conclusions of law, and order of the National Labor Relations Board (B. A. 6-37) are reported at 72 NLRB 411.

JURISDICTION

The decree of the court below was entered on January 3, 1950 (C. A. 62-64). The Company's petition for a writ of certiorari was filed on March 25, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in Appendix A, *infra*, pp. 24-27.

QUESTIONS PRESENTED

We believe that the following questions are presented on this record:

(1) Where substantial evidence supports the Board's finding that an employer directed or ordered employees to support and solicit membership for one of two rival labor organizations; interrogated an employee as to his union activity; and announced approval of a wage increase at a critical moment before an election, crediting the favored organization for this result, does the First Amend-

ment or Section 8 (c) of the amended Act preclude the Board from finding such conduct violative of Section 8 (1) of the Act?[2]

2. Whether the amendment to Section 10 (e), concerning the scope of judicial review, precludes the Board from finding that promulgation of a rule prohibiting union solicitation on an employer's property during non-working hours violates Section 8 (1) of the Act, there being no evidence that such a rule is necessary for the proper conduct of the employer's business?

3. Where substantial evidence supports the Board's finding that the employer has unlawfully assisted a labor organization, may the Board properly order the employer to refrain from recognizing or bargaining with that organization until it has been certified by the Board?

STATEMENT

A. *The facts found by the Board.*—Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board, on February 6, 1947, issued its findings of fact, conclusions of law,

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[2] Although question numbered 3(4) of the petition (Pet., p. 20) raises the question "Is there substantial evidence on the record as a whole to support the Board's order, or any part thereof?" petitioner nowhere argues that the Board's subsidiary findings and conclusions as to the nature of the Company's conduct set forth below are not supported by substantial evidence and relies solely upon its claim of Constitutional and statutory immunity (see pp. 13-14, *infra*).

and order. The pertinent facts may be summarized as follows:

Petitioner, La Salle Steel Company, hereinafter called the Company, operates a steel plant in Hammond, Indiana, where the unfair labor practices here involved occurred (B. A. 22; 39, 103).[3] In 1937, the United Steel Workers of America, C. I. O., hereinafter called the Union, unsuccessfully attempted to organize the Company's employees (B. A. 23; 45, 53, 60). At about the same time, an independent employees' organization, La Salle Employees' Association, Inc., hereinafter called the Association, was organized and recognized by the Company as the exclusive bargaining representative of its employees (B. A. 23; 53, 60-61, 75).

On or about September 11, 1944, one of the employees communicated with an international representative of the Union and advised him that the Company's employees desired to join the Union (B. A. 23; 65). Thereupon, the Union began an organizational campaign among the employees by distributing leaflets in front of the plant gate and scheduling a meeting to be held on September 15 (*id.*) In September 1944, Vice President See, who was responsible for the Company's labor relations policies, met with representatives of the Associa-

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[3] Where, in a series of record references, a semi-colon appears, the references preceding it are to the Board's finding, and those following it are to the supporting evidence.

tion, and, after pointing out that the Association "was not functioning very well" (B. A. 56), instructed them that "he wanted the Association kept running." He admitted that he was "sticking his neck out too far," but nevertheless declared that the representatives should "cooperate to help the Association," because "he didn't want it to die out." (B. A. 25; 55, Tr. 157-160).

The following month, Plant Superintendent Evens called Sutkowski, an employee of long standing, to his office, and after making clear to him the Company's opposition to the Union, said (B. A. 23-24; 45-47):

> Well, as far as the C. I. O. is concerned, it is up to you old men. If you want it in, well, there is nothing I can do about it. However, if you old men don't want it in here, there is a lot you can do. There is Herman Uhter, there is Story, Fred Lack, they are trying hard to stop it.

The Company's policy thus set by Vice President See and Superintendent Evens was further implemented by Foreman Sylwestrowicz. On September 15, 1945, while leaflets announcing the Union meeting to be held that evening were being distributed in front of the plant, Foreman Sylwestrowicz cautioned employee Emil Balash, one of his subordinates, to pay no attention to the "men out at the gate passing out C. I. O. handbills" (B. A. 24; 58,

65). Sylwestrowicz added that the Company "was very equal with their men and that they didn't need any union * * * he never thought that the C. I. O. would get into LaSalle Steel" (*ibid.*). On the following day, Sylwestrowicz asked Balash whether he had attended the union meeting (B. A. 24; 59). Sylwestrowicz, on this occasion, advised Balash that the "Association was getting active and looking for new members," and asked Balash to join the Association (*ibid.*).

Pursuant to a petition filed by the Union in February, 1945, the Board scheduled an election to be conducted in the plant on April 20, 1945 with the Union and the Association on the ballot (C. A. 39). On April 19, 1945, the day preceding the election, the Company distributed to its employees, and posted on the bulletin boards, a letter signed by Vice President See expressing the Company's satisfaction with what See termed the "pleasant and harmonious" labor relations then existing, and restating the Company's policy with respect to union activity on company property (B. A. 25-27; 40-41, 106-107). The letter set forth the following rule (B.A. 25-26; 41, 106):

> Solicitation of memberships of any kind on company time or property has been and will continue to be prohibited.

This was the first time that the Company had formalized in writing its rule prohibiting solicita-

tion during non-working as well as working time.[4]

On the day of the election, about one hour before the employees on the afternoon shift were scheduled to vote, Vice President See announced throughout the plant that the War Labor Board had approved a wage increase for the employees and that retroactive payments would be made as soon as possible. The announcement, which gave credit for the increase to the Association equally with the Company, was made at this time despite the fact that the Company had not as yet received from the War Labor Board official notification of the action (B. A. 10, 27; 47-49, 69, 71-72, 109). The Union lost the election (C. A. 39).

B. *The Board's conclusions.*—The Board found (B. A. 7-8), that by directing its employees to keep the Association alive and to support it as a bulwark against the Union; by interrogating Balash with respect to his attendance at the Union meeting and soliciting his membership in the Association; by creating prestige for the Association through its critically timed announcement of the wage increase; and by prohibiting union solicitation during non-working hours, the Company violated Section 8 (1) of the Act. The Board found that the conduct of the Company's officers was "designed to

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[4] Plant Superintendent Evens had previously orally warned employees against "talking union" or soliciting union memberships on company time or property and had instructed all foremen to report any activity of that nature (B. A. 28; 61, 67-68).

throw the full weight of management's prestige and economic power behind the Association." Specifically, the Board found that "viewed in the light of the attending circumstances" the statements of See and Evens were not mere expressions of opinion but "were in the nature of directives or orders which employees do not normally feel free to ignore"; and that the solicitation and interrogation of Balash by Sylwestrowicz were "acts of unlawful interference and intimidation * * *."

The Board, reversing the Trial Examiner, held that while the letter of April 19, 1945, may have been a "subtle 'appeal to the employees to vote for the * * * Association'" it was "the sort of expression of opinion that is protected by the Constitution" (B. A. 8-9, 25-27). The Board also held protected Foreman Walker's statement to employee Skaggs in the fall of 1944 that "the C. I. O. was no good and all they are doing was trying to bleed the men for their money" (B. A. 7, 24-25; Tr. 264).

C. *The Board's order.*—The Board ordered the Company to cease and desist from (1) encouraging activity on behalf of, and membership in, the Association while discouraging activity on behalf of, and membership in, the Union; (2) prohibiting union activity on company property during nonworking time; and (3) in any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to

form labor organizations, to join or assist the Union, or any other labor organization of its employees, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, as guaranteed in Section 7 of the Act (B. A. 12-13).

The Board also ordered the Company to rescind its rule prohibiting union activity on company property, insofar as it applies to the employees' non-working time; refrain from entering into any collective bargaining contract with the Association, or otherwise dealing with it as the bargaining representative of petitioner's employees unless and until the Association shall have been certified as such representative by the Board; and to post the usual notices (*ibid.*).

D. *The proceedings in the Court of Appeals.*—In its brief in the court below, opposing the Board's petition for enforcement of its order, the Company challenged the Board's finding that the statements of See and Evens, set forth above (*supra,* pp. 4-5), were "directives or orders" and asserted that these statements, as well as Sylwestrowicz' interrogation and solicitation of Balash, were mere expressions of "views, arguments, or opinions" (Br. pp. 28-30).[5] The Company stated (Br., p. 28), that Section 8 (c) of the amended

[5] Copies of the briefs filed in the court below have been lodged with the Clerk of this Court.

Act constituted merely a restatement of the area of protected speech delineated in *Thomas* v. *Collins,* 323 U. S. 516, and thereby, as the court below noted, in effect conceded that if the statements "go beyond the 'expressing of * * * views, argument or opinion'," they are not protected either by the First Amendment or by Section 8 (c) and may "constitute evidence of unfair labor practices" (C. A. 58-59). The Company further conceded that the Board had based its findings concerning the nature of the statements upon "all of the evidence * * * taken together" (Br., p. 38), and urged that if the court should hold, contrary to the Board, that any of the incidents relied upon were mere expressions of views, argument or opinion, the court should remand the case to the Board "to determine whether the Board would have issued its order on the remaining evidence if such remaining evidence is considered substantial" (*ibid.*).

The court held that the statements relied upon by the Board "go beyond the expression of 'views, argument or opinion' * * * and constitute acts of interference with [the] employees' right to elect their own bargaining representative" (C. A. 59). Quoting the decision of this Court in *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 477, that "pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways," the court held that "the statements in question, in con-

nection with the announcement made by respondent on the day of the election, constitute substantial evidence of interference,"[6] and "require this court to sustain the Board's finding that respondent violated Section 8 (1) of the Act" (C. A. 59, see also, 55).

The court below also rejected the Company's contentions (1) that the amendment to Section 10 (e) of the Act left unsupported the Board's finding that the Company's promulgation of a rule prohibiting solicitation during non-working hours violated Section 8 (1) of the Act (C. A. 57-58), and (2) that insofar as the Board's order enjoined the Company from recognizing the Association unless and until it was certified by the Board, it was not justified by the violations found (C. A. 60).

ARGUMENT

1. The court below did not hold, contrary to petitioner's contention (Pet., pp. 21, 23), that the "First Amendment does not apply to Section 8 (1) of the Act." Indeed, the opinion on its face discloses that the court below tested the statements here involved by the criteria established in *National Labor Rela-*

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[6] This language, and the opinion as a whole, make it clear that although the court, perhaps inadvertently, referred to all of the statements of See, Evens and Sylwestrowicz as "interrogation" (C. A. 55, cf. 59), it did not thereby intend to reject the Board's findings as to the nature and coercive effect of the directives, orders, and solicitation, or to hold that the statements were violative of the Act only insofar as they constituted "interrogation." The Board did not, as petitioner suggests (Pet., p. 35), abandon in the court below its finding that the solicitation was an unfair labor practice.

tions Board v. *Virginia Electric & Power Co.*, 314 U. S. 469, and reaffirmed in *Thomas* v. *Collins*, 323 U. S. 516. The court applied the distinction drawn in those cases between mere expression of opinion, or argument, unaccompanied by promise of benefit or threat of reprisal, which is protected by the First Amendment, and "pressure exerted vocally" by the employer, which is not.

The same distinction, as the legislative history of the amended Act establishes (93 Cong. Rec. 3837), and as petitioner conceded in the court below (*supra*, pp. 9-10), was embodied in Section 8 (c).[7] That Section protects from consideration as evidence of unfair labor practices only the "expressing of views, argument, or opinion," and not directives, orders, interrogations and solicitation. In the course of debate on the bill which became the amended Act, Senator Taft specifically stated that Section 8 (c) "has no application to statements which are acts in themselves or contain directions or instructions" (93 Cong. Rec. 6444, 6860).[8]

The Board gave effect to this distinction in its decision, which preceded enactment of Section 8 (c). Thus, the Board held that the appeal to the

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[7] In view of this concession, petitioner's question numbered 2 (3), "In its application to this case, is the free speech protection provided in Section 8 (c) broader than the guarantee of the First Amendment," was not specifically answered by the court below and, hence, is not appropriately presented to this Court for decision. Cf. *United States* v. *Ballard*, 322 U.S. 78, 88.

[8] Cf. *International Brotherhood* v. *National Labor Relations Board*, decided February 24, 1950 (C. A. 2).

employees to vote for the Association, which was contained in the Company's letter of April 19, 1945, and the statement of Foreman Walker to employee Skaggs (*supra,* pp. 6, 8), being no more than efforts to *persuade* the employees to action, were constitutionally protected, while the verbal acts through which the Company interfered with the employees' freedom of choice, were not.[9] Cf. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. Since the Board did not find that any statement by petitioner which amounted to no more than an "expression of views, argument or opinion" constituted an unfair labor practice because it was intertwined with petitioner's coercive course of conduct, this case does not present the question whether Section 8 (c) would preclude the Board from making such a finding. (See note 10 *infra,* p. 15.)

2. The Board's finding that the statements of See, Evens, and Sylwestrowicz were not mere expressions of opinion but rather directions or orders, interrogation and solicitation is, as the court below held, amply supported by the evidence set forth in the Statement, *supra,* pp. 3-7, and the Company, in its Petition, nowhere argues to the contrary. The Company argues rather (Pet., p. 22), that "The findings and conclusions of the Board were made on the basis that there was no direct use of economic

[9] This holding makes it clear that the Board's decision in this case does not rest, as petitioner implies (Pet., p. 36), upon any distinction between statements made to individual employees and announcements to groups of employees.

power, but that *any* statement to an employee by *any* top representative of a management was *necessarily* 'coercive.' " This contention, as the Board's decision shows, is palpably untenable. The Board found (B. A. 8) that the Company threw the "full weight" of its "economic power behind the Association," and that See's statement that "he wanted the Association kept running," and the "pressure exerted upon employees Sutkowski by Superintendent Evens to enlist his aid in supporting the Association and defeating the Union, * * * especially when viewed in the light of the attending circumstances, were in the nature of directives or orders which employees do not normally feel free to ignore." The Board further found that the solicitation and interrogation of Balash by Sylwestrowicz were acts of "intimidation."

3. The cases which petitioner claims hold conduct similar to that here involved to be protected by the First Amendment and Section 8 (c) (Pet., pp. 29, 32-33), do not support its position. None of the cases hold that instructions or directions issued by management to employees, or the questioning and solicitation of employees by management officials, are protected by the First Amendment or Section 8 (c) from being considered unfair labor practices. The cases cited on page 29 of the Petition hold only that communications outlining management's views, opinions, and arguments, which contain no threat of reprisal or promise of benefit, are protected by the First Amendment. The cases cited on

page 32-33 of the Petition, which discuss both the First Amendment and Section 8 (c), likewise hold only that such communications are protected.[10] Indeed, insofar as these cases involve conduct similar to that found unlawful in the instant case, they are in accord with the holding below on the free speech question. In *National Labor Relations*

[10] In *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, decided February 17, 1950 (C. A. 6), petition for certiorari pending, No. 732, this Term, upon which the Company relies, the court held that in view of Section 8 (c), the "Ferbert letters", which the Board had found not to be violative of the Act *per se*, could not be considered part of an illegal pattern of conduct by the company. No analogous question is raised in the instant case, since the Board did not find the Company's letter of April 19, 1945, to be part of the pattern of illegal conduct, and, except to the extent that it announced the no-solicitation rule, did not find the letter violative of the Act. In *National Labor Relations Board* v. *The Bailey Co.*, 180 F. 2d 278, 280 (C. A. 6), the same judges who decided the *Pittsburgh* case held that a pre-election announcement of a wage increase by the company was not protected by the First Amendment or Section 8 (c), citing with approval the holding of the court below in the instant case. In *National Labor Relations Board* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 981 (C. A. 3), upon which the Company also relies, the court found that a speech to employees by a management representative went beyond persuasion because it contained statements which coerced, intimidated and promised benefits to employees, and held the speech unprotected and violative of Section 8 (1). In *National Labor Relations Board* v. *Kropp Forge Co.*, 178 F. 2d 822, 826-829 (C. A. 7), the court below did not hold, as petitioner asserts (Pet., p. 33), that the phrase "views, argument or opinion" protected "similar expressions to the ones in this case." The court held precisely the contrary. It found that under the circumstances there presented, statements by the plant manager to employees that "I don't want no organization in here," and that "I don't care whether the employees form an independent organization or one affiliated with the A. F. of L., but for the love of Pete, anything but the C.I.O.," were not protected by the First Amendment or Section 8 (c), and were properly found by the Board to constitute violations of Section 8 (1).

Board v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 447 (C. A. 9), the court held that the conduct of management representatives in instructing employees to solicit membership for one of two rival labor organizations constituted unlawful assistance in violation of Section 8 (1). In *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C. A. 8), the court specifically found that "questioning of employees is not protected by Section 8 (c) of the Act, * * * and was an unfair labor practice."

This Court and every court of appeals which has considered employer conduct analogous to that found unlawful in the instant case has held that directions or orders to support or refrain from supporting a labor organization, direct solicitation of membership, interrogation of employees concerning union activity, and announcement of wage increases designed to bolster the prestige of one labor organization at the expense of another or to demonstrate that unionization is entirely unnecessary,[11] are violative of Section 8 (1) of the Act. For references to the many cases to this effect, see Appendix B, *infra*, pp. 28-29.

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[11] In *S. Frieder & Sons*, 62 NLRB 881, 886, the Board found that the action of the employer on the morning of the Board election, in posting a notice that the War Labor Board had approved the employer's application for vacations with pay, constituted unlawful interference. The Court of Appeals for the Third Circuit enforced the Board's order in full in a *per curiam* opinion, 155 F. 2d 266. The War Labor Board, during its existence, also found that "an increase on the eve of an election may endanger the fairness of the election." *Western Cartridge Co.*, 6 War Lab. Rep. 17, 18. There are no contrary holdings.

4. Petitioner argues (Pet. pp. 34-35), that in treating the statements of See, Evens and Sylwestrowicz, together with the wage increase announcement, as parts of a single course of conduct by the Company, the court below departed from the Board's findings. Petitioner cites, as embodying the Board's view, the statement in the Board's opinion (B.A. 8) that the solicitation and interrogation of Balash by Sylwestrowicz "constituted acts of unlawful interference and intimidation *per se.*" But the Board also adopted (B.A. 7) the finding of the trial examiner (B.A. 28), that Sylwestrowicz' conduct was part of a "consistent pattern" of conduct by the Company, "assisting and encouraging membership and activity in one labor organization while discouraging membership and activity in another." In any event, Petitioner's concession in the court below (Br., p. 38) that "The Board * * * based its conclusion that respondent violated Section 8 (1) of the Act on all of the evidence * * * taken together," makes wholly inappropriate its request of this Court to decide to the contrary. See *supra,* p. 10.[12]

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[12] Since in this case the interrogation of Balash does not stand "naked and alone", the decision in no sense conflicts with *National Labor Relations Board* v. *Hinde & Dauch Paper Co.,* 171 F. 2d 240 (C. A. 4). The *Hinde & Dauch* case is similar to *Sax* v. *National Labor Relations Board,* 171 F. 2d 769, which the court below distinguished on this very ground (C.A. 59). Since Foreman Sylwestrowicz' conduct was not contrary to, but in accordance with, the policy set by the highest officials of the Company, the holding of the court below that the Company is chargeable with Sylwestrowicz' conduct is not in conflict with such cases as *National*

5. Petitioner is in error when it asserts that the amendment to Section 10 (e) which provides that the courts shall enforce orders of the Board if the findings are supported by "substantial evidence on the record considered as a whole," has reversed the rule of *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793. In the *Republic* case, this Court held that promulgation of a rule prohibiting solicitation of union membership on company property during employees' non-working time violated Section 8 (1) of the Act. The Court sustained the Board's finding that, in the absence of evidence that such a rule was necessary to maintain discipline, the resultant interference with union activity was unreasonable.[13] Section 10 (e), which deals with the scope of judicial review, did not amend Section 8 (1), which defines substantive unfair labor practices, and promulgation or en-

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Labor Relations Board v. *Montgomery Ward & Co.,* 157 F. 2d 486, 501 (C. A. 8), and *National Labor Relations Board v. Brown-Brockmeyer Co.,* 143 F. 2d 537, 541 (C.A. 6). In view of the holding of the Board and the court below that Sylwestrowicz' statements were not merely reflections of his "personal opinion," and were not contrary to Company policy, petitioner's question numbered 3 (3) (Pet., p. 20), is not properly presented in this case.

[13] *National Labor Relations Board* v. *Enid Co-op. Creamery Ass'n,* 169 F. 2d 986 (C. A. 10), which petitioner claims is in conflict with the decision below on this point is clearly distinguishable. There the company moved the court to remand the case to the Board to take proffered evidence that the rule under the special circumstances there involved was necessary to preserve discipline, and the court granted the motion. In the special circumstances of that case, the Board thereafter did not take further evidence but modified its order by eliminating the requirement that the company

forcement of a no-solicitation rule, under the circumstances of the *Republic* case, therefore remains a violation of the Act. As the court below stated (C. A. 57-58):

> While the amendment may mean that existence of the no-solicitation rule must be proved by "substantial evidence on the record considered as a whole" instead of just "substantial evidence," it does not seem to us that it could have the effect of altering the weight to be accorded to the existence of the rule, once the fact is proved. And the clear statement of the rule in the letter distributed by [the Company] to its employees on the eve of the election precludes the court from setting aside the Board's finding, for it is, undeniably, substantial evidence of the existence of the rule, whether viewed alone or on the record considered as a whole.

The legislative history upon which petitioner relies to support its argument that the amendment to Section 10 (e) was intended to affect the rule of the *Republic* case (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 56; S. Rep. No. 105, 80th Cong., 1st Sess., p. 26),[14] constitutes little more than an

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rescind its rule. In thereafter reviewing the Board's order, the court commented (169 F. 2d, at p. 987): "In view of the failure of the Board to hear testimony on the issues framed by the order of remand, and the abandonment of its recission order, we must presume that the order was, in the special circumstances, necessary to maintain production or discipline."

[14] H. Rep. No. 245, 80th Cong., 1st Sess., p. 41, cited by the petitioner (Pet., p. 33, note 4) bears less directly on the problem than S. Rep. No. 105, cited above.

expression of the Congressional committees' view that "inferences" should not be drawn from "facts which are not in the record." S. Rep. No. 105, *supra*. This Court's decision in the *Republic* case is not inconsistent with that view and, in suggesting otherwise, the committees misconceived the holding in that case. For this Court, in the *Republic* case, specifically upheld the power of the Board to "infer within the limits of the inquiry *from the proven facts* such conclusions as reasonably may be based *upon the facts proven.*" 324 U. S. 800 (Italics supplied). In that case, as here (B. A. 28, note 4), the Board's finding that the rule against solicitation interfered with legitimate union activity rested upon the evidence in the record that the rule existed and was enforced and upon the company's failure to prove that such interference was justified by its business needs.

Dissatisfaction of a Congressional committee with the judgments of this Court in a number of cases, in no way reflected in the language of the statute, is slim basis for implying an overruling of those decisions. Were it the Congressional purpose to change the law as to what constitutes an interference under Section 8 (1), it is hardly likely that Congress would seek to accomplish that result by amending Section 10 (e). In any event, that conclusion is not to be inferred from loose language in a committee report critical of seven decisions of this and other courts covering a wide

span of labor relations law. Cf. *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 719. Section 10 (e) certainly does not in terms preclude the Board from holding that the burden of proof as to affirmative defenses rests with the employer, or from inferring "within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 800; see also *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 663 (C. A. 2); cf. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 229-232; *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147, 150-151 (C. A. 6). Since the Company introduced no evidence of special circumstances which rendered such a rule necessary in its establishment, the court below was clearly correct in sustaining the Board's finding that, upon the evidence in the record, the rule constituted an unreasonable interference with the rights guaranteed employees in Section 7. There are no contrary decisions.

6. The Company's contention (Pet., p. 31), that that portion of the Board's order which requires the Company to refrain from recognizing or bargaining with the Association unless and until it is certified is unwarranted because the Company had refrained from entering into a contract or bargaining with the Association while the election of

April 20 was pending, misconceives the nature of the unfair labor practice which the order was designed to remedy.

The Board found that the Company had unlawfully assisted the Association and had thereby precluded the employees from freely selecting a bargaining representative. To permit the Company to recognize and bargain with the Association while this unfair labor practice remains unremedied, as the Company continued to do after the election (Tr. 463), would allow the Company to retain the fruits of its illegal conduct. Under these circumstances, the order forbidding recognition until the Association is certified is clearly adapted to the situation which calls for redress. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. Similar orders based upon findings of illegal assistance, have uniformly been sustained by the courts. *Elastic Stop Nut Corp.* v. *National Labor Relations Board,* 142 F. 2d 371, 376, 379-380 (C. A. 8), certiorari denied, 323 U. S. 722; *National Labor Relations Board* v. *Winona Knitting Mills, Inc.,* 163 F. 2d 156, 161 (C.A. 8); *National Labor Relations Board* v. *John Engelhorn & Sons,* 134 F. 2d 553, 558 (C.A. 3); *National Labor Relations Board* v. *Southern Wood Preserving Co.,* 135 F. 2d 606, 607 (C. A. 5); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 246 (C. A. 9); *Independent Employees Ass'n* v. *National Labor Rela-*

tions Board, 158 F. 2d 448, 456-457 (C. A. 2), certiorari denied, 333 U. S. 826. There is no conflict of decisions nor is any claimed to exist.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1950.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and con-

taining a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141 *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

"SEC. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

* * * * *

Int'l. Ass'n of Mach. v. *National Labor Relations Board,* 311 U. S. 72, 78-79; *Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 518-519; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 596, 599; *National Labor Relations Board* v. *Bird Machine Co.,* 161 F. 2d 589, 591 (C. A. 1); *National Labor Relations Board* v. *Consolidated Machine Tool Corp.,* 163 F. 2d 376, 378 (C. A. 2), certiorari denied, 332 U. S. 824; *National Labor Relations Board* v. *American Laundry Machine Co.,* 152 F. 2d 400, 401 (C. A. 2); *National Labor Relations Board* v. *Fitzpatrick & Weller,* 138 F. 2d 697, 699 (C. A. 2); *National Labor Relations Board* v. *M. E. Blatt Co.,* 143 F. 2d 268, 269, 273-275 (C.A. 3), certiorari denied, 323 U. S. 774; *P. H. Glatfelter Co.* v. *National Labor Relations Board* 141 F. 2d 631, 632-633 (C. A. 3); *National Labor Relations Board* v. *Norfolk Southern Bus Corp.,* 159 F. 2d 516, 518 (C. A. 4), certiorari denied, 330 U. S. 844; *National Labor Relations Board* v. *Dixie Shirt Co.,* 176 F. 2d 969, 971, 973 (C. A. 4); *American Enka Corp.* v. *National Labor Relations Board,* 119 F. 2d 60, 62, 63 (C. A. 4); *National Labor Relations Board* v. *Union Mfg. Co.,* 179 F. 2d 511, 513 (C. A. 5); *National Labor Relations Board* v. *East Texas Motor Freight Lines,* 140 F. 2d 404, 405 (C. A. 5); *Big Lake Oil Co.* v. *National Labor Relations Board,* 146 F. 2d 967, 969, 970 (C. A. 5); *National Labor Relations Board* v. *Peterson,* 157 F. 2d 514, 515 (C.A. 6), certiorari denied, 330 U. S. 838; *National*

Labor Relations Board v. *Mylan-Sparta Co., Inc.*, 166 F. 2d 485, 489-490 (C. A. 6); *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 17 (C. A. 8); *Locomotive Finished Material Co.* v. *National Labor Relations Board*, 142 F. 2d 802, 803 (C. A. 10); *National Labor Relations Board* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 105 (C. A. 8); *National Labor Relations Board* v. *Winona Knitting Mills*, 163 F. 2d 156, 158 (C. A. 8); *National Labor Relations Board* v. *Morris P. Kirk & Son*, 151 F. 2d 490, 492 (C. A. 9); *National Labor Relations Board* v. *Reeves Rubber Co.*, 153 F. 2d 340, 341 (C. A. 9); *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C. A. 9); *National Labor Relations Board* v. *Gilfillan Bros., Inc.*, 148 F. 2d 990, 991 (C. A. 9); *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570, 577 (C. A. 10), certiorari denied, 329 U. S. 732; *National Labor Relations Board* v. *Fairmont Creamery Co.*, 144 F. 2d 128, 129 (C. A. 10); *Utah Copper Co.* v. *National Labor Relations Board*, 139 F. 2d 788, 790-791 (C. A. 10), certiorari denied *sub nom. Independent Association of Mill Workers* v. *National Labor Relations Board*, 322 U. S. 731; *E. Anthony & Sons* v. *National Labor Relations Board*, 163 F. 2d 22, 25-26 (C. A. D. C.), certiorari denied, 332 U. S. 773. See also, *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U. S. 548, 559-560; *Ex Parte Curtis*, 106 U. S. 371, 374.

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